

SENATE STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

Prepared By: Governmental Oversight and Productivity Committee

BILL: CS/SB 2316

INTRODUCER: Governmental Oversight and Productivity Committee and Senator Sebesta

SUBJECT: Public Records Exemption; Bids, Proposals, Invitation to Bid, Requests for Proposals

DATE: April 4, 2006

REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Rhea	Wilson	GO	Fav/CS
2.	_____	_____	GA	_____
3.	_____	_____	RC	_____
4.	_____	_____	_____	_____
5.	_____	_____	_____	_____
6.	_____	_____	_____	_____

I. Summary:

The committee substitute extends an existing exemption for sealed bids or proposals if the agency rejects all bids and proposals and concurrently provides notice of intent to reissue the invitation to bid or request for proposals. In such an instance, the bids or proposals remain exempt until the agency provides notice of a decision or intended decision or until the agency withdraws the reissued invitation to bid or request for proposals.

This bill also creates a temporary exemption for sealed competitive replies in response to an invitation to negotiate under s. 287.012, F.S., until the agency provides notice of a decision or intended decision or until 20 days after the final competitive sealed replies are all opened, whichever is earlier. If an agency rejects all competitive sealed replies in response to an invitation to negotiate and the agency concurrently provides notice of its intent to reissue the invitation to negotiate, and the agency reissues the invitation to negotiate within 90 days of such notice of intent to reissue, the rejected replies remain exempt until such time as the agency provides notice of a decision or intended decision concerning the reissued invitation to negotiate or until the agency withdraws the reissued invitation to negotiate. In no even shall a competitive sealed reply be exempt for more than twelve months after the initial agency notice rejecting all replies. The bill also creates a meeting exemption for negotiations under s. 287.012, F.S.

This bill creates exemptions from the records and meetings requirements of Art. I, s. 24 of the State Constitution and requires a two-thirds vote of the members of both houses of the Legislature.

This bill amends section 119.071(1) of the Florida Statutes.

II. Present Situation:

Public Records – Florida has a long history of providing public access to government records. The Legislature enacted the first public records law in 1892.¹ The Florida Supreme Court has noted that ch. 119, F.S., the Public Records Act, was enacted

. . . to promote public awareness and knowledge of government actions in order to ensure that governmental officials and agencies remain accountable to the people.²

In 1992, Floridians adopted an amendment to the State Constitution that raised the statutory right of access to public records to a constitutional level.³ Article I, s. 24 of the State Constitution, provides that:

(a) Every person⁴ has the right to inspect or copy any public record made or received in connection with the official business of any public body, officer, or employee of the state, or persons acting on their behalf, except with respect to records exempted pursuant to this section or specifically made confidential by this Constitution. . . .

Unless specifically exempted, all agency⁵ records are available for public inspection. The term “public record” is broadly defined to mean:

All documents, papers, letters, maps, books, tapes, photographs, films, sound recordings, data processing software, or other material, regardless of the physical form, characteristics, or means of transmission, made or received pursuant to law or ordinance or in connection with the transaction of official business by any agency.⁶

The Florida Supreme Court has interpreted this definition to encompass all materials made or received by an agency in connection with official business which are used to perpetuate, communicate or formalize knowledge.⁷ All such materials, regardless of whether they are in final form, are open for public inspection unless made exempt.⁸

Only the Legislature is authorized to create exemptions to open government requirements.⁹ Exemptions must be created by general law and such law must specifically state the public necessity justifying the exemption. Further, the exemption must be no broader than necessary to

¹ Sections 1390, 1391, F.S. (Rev. 1892).

² *Forsberg v. Housing Authority of the City of Miami Beach*, 455 So.2d 373, 378 (Fla. 1984).

³ Article I, s. 24 of the State Constitution.

⁴ Section 1.01(3), F.S., defines “person” to include individuals, children, firms, associations, joint adventures, partnerships, estates, trusts, business trusts, syndicates, fiduciaries, corporations, and all other groups or combinations.

⁵ The word “agency” is defined in s. 119.011(2), F.S., to mean “. . . any state, county, district, authority, or municipal officer, department, division, board, bureau, commission, or other separate unit of government created or established by law including, for the purposes of this chapter, the Commission on Ethics, the Public Service Commission, and the Office of Public Counsel, and any other public or private agency, person, partnership, corporation, or business entity acting on behalf of any public agency.”

⁶ Section 119.011(11), F.S.

⁷ *Shevin v. Byron, Harless, Schaffer, Reid and Associates, Inc.*, 379 So.2d 633, 640 (Fla. 1980).

⁸ *Wait v. Florida Power & Light Company*, 372 So.2d 420 (Fla. 1979).

⁹ Article I, s. 24(c) of the State Constitution.

accomplish the stated purpose of the law.¹⁰ A bill enacting an exemption¹¹ may not contain other substantive provisions, although it may contain multiple exemptions that relate to one subject.¹² A bill creating an exemption must be passed by a two-thirds vote of both houses.¹³

The Public Records Act¹⁴ specifies conditions under which public access must be provided to records of the executive branch and other agencies. Section 119.07(1) (a), F.S., states:

Every person who has custody of a public record shall permit the record to be inspected and examined by any person desiring to do so, at any reasonable time, under reasonable conditions, and under supervision by the custodian of the public record.

If a record has been made exempt, the agency must redact the exempt portions of the record prior to releasing the remainder of the record.¹⁵ The records custodian must state the basis for the exemption, in writing if requested.¹⁶

There is a difference between records that the Legislature has made exempt from public inspection and those that are *confidential* and exempt.¹⁷ If the Legislature makes a record confidential and exempt, such information may not be released by an agency to anyone other than to the persons or entities designated in the statute.¹⁸ If a record is simply made exempt from disclosure requirements, an agency is not prohibited from disclosing the record in all circumstances.¹⁹

In *Ragsdale v. State*,²⁰ the Florida Supreme Court held that the applicability of a particular exemption is determined by the document being withheld, not by the identity of the agency possessing the record. Quoting from *City of Riviera Beach v. Barfield*,²¹ a case in which documents were given from one agency to another during an active criminal investigation, the *Ragsdale* court refuted the proposition that inter-agency transfer of a document nullifies the exempt status of a record:

“We conclude that when a criminal justice agency transfers protected information to another criminal justice agency, the information retains its exempt status. We believe that such a conclusion fosters the underlying purpose of section 119.07(3)(d), which is to prevent premature *public* disclosure of criminal investigative information since disclosure could impede an ongoing investigation

¹⁰ *Memorial Hospital-West Volusia v. News-Journal Corporation*, 729 So.2d 373, 380 (Fla. 1999); *Halifax Hospital Medical Center v. News-Journal Corporation*, 724 So.2d 567 (Fla. 1999).

¹¹ Under s. 119.15, F.S., an existing exemption may be considered a new exemption if the exemption is expanded to cover additional records.

¹² Art. I, s. 24(c) of the State Constitution.

¹³ *Ibid.*

¹⁴ Chapter 119, F.S.

¹⁵ Section 119.07(1)(b), F.S.

¹⁶ Section 119.07(1)(c) and (d), F.S.

¹⁷ *WFTV, Inc., v. The School Board of Seminole, etc., et al*, 874 So.2d 48 (5th DCA), rev. denied 892 So.2d 1015 (Fla. 2004).

¹⁸ *Ibid* at 53; *see also*, Attorney General Opinion 85-62.

¹⁹ *Williams v. City of Minneola*, 575 So.2d 683, 687 (Fla. 5th DCA), review denied, 589 So.2d 289 (Fla. 1991).

²⁰ 720 So.2d 203 (Fla. 1998).

²¹ 642 So.2d 1135, 1137 (Fla. 4th DCA 1994).

or allow a suspect to avoid apprehension or escape detection. In determining whether or not to compel disclosure of active criminal investigative or intelligence information, *the primary focus must be on the statutory classification of the information sought rather than upon in whose hands the information rests.* Had the legislature intended the exemption for active criminal investigative information to evaporate upon the sharing of that information with another criminal justice agency, it would have expressly provided so in the statute.” Although the information sought in this case is not information currently being used in an active criminal investigation, the rationale is the same; that is, that the focus in determining whether a document has lost its status as a public record must be on the policy behind the exemption and not on the simple fact that the information has changed agency hands. Thus, if the State has access to information that is exempt from public records disclosure due to confidentiality or other public policy concerns, that information does not lose its exempt status simply because it was provided to the State during the course of its criminal investigation.²²

It should be noted that the definition of “agency” provided in the Public Records Law includes the phrase “and any other public or private agency, person, partnership, corporation, or business entity *acting on behalf of any public agency*” (emphasis added). Agencies are often authorized, and in some instances are required, to “outsource” certain functions. Under the current case law standard, agencies are not required to have explicit statutory authority to release public records in their control to their agents. Their agents, however, are required to comply with the same public records custodial requirements with which the agency must comply.

The Open Government Sunset Review Act - The Open Government Sunset Review Act²³ provides for the systematic review of an exemption five years after its enactment. Each year, by June 1, the Division of Statutory Revision of the Joint Legislative Management Committee is required to certify to the President of the Senate and the Speaker of the House of Representatives the language and statutory citation of each exemption scheduled for repeal the following year.

The act states that an exemption may be created or expanded only if it serves an identifiable public purpose and if the exemption is no broader than necessary to meet the public purpose it serves. An identifiable public purpose is served if the exemption meets one of three specified criteria and if the Legislature finds that the purpose is sufficiently compelling to override the strong public policy of open government and cannot be accomplished without the exemption. An identifiable public purpose is served if the exemption:

- [a]llows the state or its political subdivisions to effectively and efficiently administer a governmental program, which administration would be significantly impaired without the exemption;

²² *Ragsdale*, 720 So.2d at 206 (quoting *City of Riviera Beach*, 642 So.2d at 1137) (second emphasis added by *Ragsdale* court).

²³ Section 119.15, F.S.

- [p]rotects information of a sensitive personal nature concerning individuals, the release of which would be defamatory or cause unwarranted damage to the good name or reputation of such individuals, or would jeopardize their safety; or
- [p]rotects information of a confidential nature concerning entities, including, but not limited to, a formula, pattern, device, combination of devices, or compilation of information that is used to protect or further a business advantage over those who do not know or use it, the disclosure of which would injure the affected entity in the marketplace.²⁴

The act also requires consideration of the following:

- What specific records or meetings are affected by the exemption?
- Whom does the exemption uniquely affect, as opposed to the general public?
- What is the identifiable public purpose or goal of the exemption?
- Can the information contained in the records or discussed in the meeting be readily obtained by alternative means? If yes, how?
- Is the record or meeting protected by another exemption?
- Are there multiple exemptions for the same type of record or meeting that it would be appropriate to merge?

While the standards in the Open Government Sunset Review Act may appear to limit the Legislature in the exemption review process, those aspects of the act that are only statutory as opposed to constitutional, do not limit the Legislature because one session of the Legislature cannot bind another.²⁵ The Legislature is only limited in its review process by constitutional requirements.

Further, s. 119.15(4) (e), F.S., makes explicit that:

... notwithstanding s. 768.28 or any other law, neither the state or its political subdivisions nor any other public body shall be made party to any suit in any court or incur any liability for the repeal or revival and reenactment of any exemption under this section. The failure of the Legislature to comply strictly with this section does not invalidate an otherwise valid reenactment.

Agency Procurement – Agency procurements of commodities or contractual services that exceed \$25,000, i.e., Category Two, are governed by statute and rule that require one of the following three types of competitive solicitations to be utilized, unless otherwise authorized by law:²⁶

- Invitation to bid (ITB): An agency must use an ITB when it is capable of specifically defining the scope of work for which a contractual service is required or capable of establishing the precise specifications defining the commodities sought.²⁷ The contract

²⁴ Section 119.15(4) (b), F.S.

²⁵ *Straughn v. Camp*, 293 So.2d 689, 694 (Fla. 1974).

²⁶ *See, infra*, at pp. (discussing general exceptions and emergency, sole source, and state term contract purchases).

²⁷ Section 287.012(16), F.S.

must be awarded to the responsible²⁸ and responsive vendor²⁹ that submits the lowest responsive bid.^{30 31}

- Request for proposals (RFP): An agency may use a RFP when it determines in writing that it is not practicable for it to specifically define the scope of work for which the commodity or contractual service is required and when it is requesting that the vendor propose commodities or contractual services to meet the RFP's specifications.³² Unlike the ITB process, the contract need not be awarded to the lowest priced vendor; rather, the award shall be given to the responsible and responsive vendor whose proposal is determined in writing to be the most advantageous to the state after consideration of the price and other criteria set forth in the RFP.³³
- Invitation to negotiate (ITN): An agency may use an ITN when it determines in writing that negotiation is necessary for the state to achieve the best value.^{34 35} After ranking the replies received in response to the ITN, the agency must select, based on the rankings, one or vendors with which to commence negotiations. The contract must be awarded to the responsible and responsive vendor that the agency determines will provide the best value to the state.³⁶

III. Effect of Proposed Changes:

Currently, sealed bids or proposals received by an agency pursuant to invitations to bid or requests for proposals are exempt from public records requirements until the agency provides notice of a decision or intended decision or within 10 days after bid or proposal opening, whichever is earlier. The committee substitute extends the exemption for sealed bids or proposals if the agency rejects all bids and proposals and concurrently provides notice of intent to reissue the invitation to bid or request for proposals. In such an instance, the bids or proposals remain exempt until the agency provides notice of a decision or intended decision or until the agency withdraws the reissued invitation to bid or request for proposals.

This bill also creates a temporary exemption for sealed competitive replies in response to an invitation to negotiate under s. 287.012, F.S., until the agency provides notice of a decision or intended decision or until 20 days after the final competitive sealed replies are all opened, whichever is earlier. If an agency rejects all competitive sealed replies in response to an invitation to negotiate and the agency concurrently provides notice of its intent to reissue the

²⁸ The term "responsible vendor" means, ". . . a vendor who has the capability in all respects to fully perform the contract requirements and the integrity and reliability that will assure good faith performance." Section 287.012(24), F.S.

²⁹ "Responsive vendor" means, ". . . a vendor that has submitted a bid, proposal, or reply that conforms in all material respects to the solicitation." Section 287.012(26), F.S.

³⁰ Section 287.057(1), F.S.

³¹ "Responsive bid," "responsive proposal," or "responsive reply" means, ". . . a bid, proposal, or reply submitted by a responsive and responsible vendor that conforms in all material respects to the solicitation." Section 287.012(25), F.S.

³² Sections 287.017(22) and 287.057(2), F.S.

³³ Section 287.057(2), F.S.

³⁴ Sections 287.012(17) and 287.057(3), F.S.

³⁵ "Best value" means, ". . . the highest overall value to the state based on objective factors that include, but are not limited to, price, quality, design, and workmanship." Section 287.012(4), F.S.

³⁶ Section 287.057(3), F.S.

invitation to negotiate, and the agency reissues the invitation to negotiate within 90 days of such notice of intent to reissue, the rejected replies remain exempt until such time as the agency provides notice of a decision or intended decision concerning the reissued invitation to negotiate or until the agency withdraws the reissued invitation to negotiate. In no event shall a competitive sealed reply be exempt for more than twelve months after the initial agency notice rejecting all replies. The bill also creates a meeting exemption for negotiations under s. 287.012, F.S.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

This bill creates new exemptions from public records and meetings requirements and requires passage by a two-thirds vote of the membership of each house.

C. Trust Funds Restrictions:

None.

V. Economic Impact and Fiscal Note:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

The exemption will protect information provided by persons and businesses if the agency reopens bids.

C. Government Sector Impact:

The exemption will improve the ability of agencies to obtain the best pricing.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Summary of Amendments:

None.

This Senate staff analysis does not reflect the intent or official position of the bill's introducer or the Florida Senate.
